

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 VIRGINIA REEDER,	)	Civil No. 07-CV-362-L(LSP)
	)	
12 Plaintiff,	)	<b>ORDER GRANTING MOTION TO</b>
	)	<b>DISMISS FOR INEFFECTIVE</b>
13 v.	)	<b>SERVICE OF PROCESS AS TO</b>
	)	<b>MONTY COUNSELL [doc. #81]</b>
14 JOHN KNAPIK dba K/MONT	)	
15 CONSTRUCTION, <i>et al.</i> ,	)	
	)	
16 Defendants.	)	

---

17 Defendants City of San Diego Department of Development Service and the City of San  
18 Diego have moved to dismiss plaintiff's second amended complaint ("SAC") as to Monty  
19 Counsell for ineffective service of process. [doc. #81]. The motion was set for hearing on June  
20 23, 2008. Plaintiff was advised that under the Civil Local Rules, a response in opposition to the  
21 motion to dismiss as to Monty Counsell was required to be filed on or before June 9, 2008 in  
22 order to be considered timely and failure to file a timely opposition to the motion may be  
23 construed as a consent to the granting of the motion to dismiss the second amended complaint.  
24 Plaintiff has not filed a response nor has she sought additional time in which to file a response.

25 Notwithstanding the lack of a response, the Court undertakes a review of the motion on  
26 the merits to determine whether defendant Monte Counsell should be dismissed from the SAC  
27 for plaintiff's failure to properly effectuate service of process and for failure to serve the SAC  
28 within Federal Rule of Civil Procedure 4.

Defendant Counsell contends he has never been served with any of plaintiff's complaints. Counsell was not named in the original complaint filed February 26, 2007. Although named in the First Amended Complaint, there is nothing in the Court's record indicating plaintiff ever served defendant Counsell. On January 14, 2008, plaintiff filed a Certificate of Service purportedly with respect to defendant Counsell but the certificate shows that plaintiff mailed the SAC and/or summons to the City Attorney's Office in care of the Deputy City Attorney assigned to the case. *See* Docket No. 76.<sup>1</sup> Because Counsell had never been served with the original or first amended complaint, plaintiff was required to serve Counsell in accordance with Federal Rule of Civil Procedure 4. The Court previously dismissed another defendant, John Knapik, for plaintiff's failure to properly effectuate service of process. *See* Order filed June 5, 2007 [doc. #32]. In that Order, plaintiff was given detailed information about how to effectuate service of process on an individual as follows:

A plaintiff must serve the defendant with a copy of summons and complaint within 120 days of filing a complaint. FED. R. CIV. P. 4(m). Rule 4 contains detailed provisions as to the manner in which service must occur. "A liberal construction of Rule 4 'cannot be utilized as a substitute for the plain legal requirement as to the manner in which service of process may be had.'" SCHWARZER, *FEDERAL CIVIL PROCEDURE BEFORE TRIAL*, ¶ 5:347 (2005) (quoting *Mid-Century Wood Products, Inc. v. Harris*, 936 F.2d 297, 300 (7th Cir.1991)); *see also* *Prewitt Enterprises, Inc. v. Organization of Petroleum Exporting Countries*, 353 F.3d 916, 924-25 (11th Cir.2003) (holding that even though defendant had actual notice of the lawsuit, service of process was ineffective because it was not in substantial compliance with Rule 4(f)).

---

<sup>1</sup> The Certificate of Service provides in relevant part:

I declare that on this 11<sup>th</sup> day of January, 2006 [sic], that a true copy of the Plaintiff's Second Amended Complaint were [sic] mailed by first class mail to:

Defendants City of San Diego and Monty Counsell  
c/o: Attorneys Wendy Davisson and Mark Edelman  
1200 3<sup>rd</sup> Avenue, suite #1100  
San Diego, California 92101 . . .

*See* Certificate of Service, doc. no. 76. The Court assumes plaintiff intended the date to be January 11, 2008, not 2006.

1 Federal Rule of Civil Procedure 4(e) concerns service of process upon individuals within  
2 a judicial district of the United States:

3 Unless otherwise provided by federal law, service upon an individual from whom  
4 a waiver has not been obtained and filed, other than an infant or an incompetent  
person, may be effected in any judicial district of the United States:

5 (1) pursuant to the law of the state in which the district court is located, or  
6 in which service is effected, for the service of a summons upon the  
defendant in an action brought in the courts of general jurisdiction of the  
7 State; or

8 (2) by delivering a copy of the summons and of the complaint to the  
9 individual personally or by leaving copies thereof at the individual's  
dwelling house or usual place of abode with some person of suitable age  
10 and discretion then residing therein or by delivering a copy of the summons  
and of the complaint to an agent authorized by appointment or by law to  
receive service of process.

11 FED. R. CIV. P. 4(e). Accordingly, under Rule 4(e), service of process should be upheld if it  
12 conforms to either federal or applicable state service of process rules.

13 As set forth in Rule 4(e), service of process may be effected “pursuant to the law of the  
14 state in which the district court is located . . . .” FED. R. CIV. P. 4(e)(1). California law provides  
15 for service of a summons upon an individual person “by delivering a copy of the summons and  
16 of the complaint to such person or to a person authorized by him to receive service of process.”  
17 CAL. CIV. PROC. CODE § 416.90. If, after reasonable diligence, the summons and complaint  
18 cannot be personally delivered in accordance with Section 416.90, several methods of substitute  
19 service are permitted. CAL. CIV. PROC. CODE § 415.20(b). One such method is effected by  
20 leaving a copy of the summons and complaint at the usual place of business of the person to be  
21 served, in the presence of a person apparently in charge, and afterwards mailing a copy of the  
22 summons and complaint to the same location. *Id.* Another method is effected by “leaving a  
23 copy of the summons and complaint at the person's dwelling house, usual place of abode, usual  
24 place of business, or usual mailing address other than a United States Postal Service post office  
25 box, in the presence of a competent member of the household or a person apparently in charge of  
26 his or her office, place of business, or usual mailing address other than a United States Postal  
27 Service post office box, at least 18 years of age, who shall be informed of the contents thereof,  
28 and by thereafter mailing a copy of the summons and of the complaint by first-class mail,

1 postage prepaid to the person to be served at the place where a copy of the summons and  
2 complaint were left.” CAL. CIV. PROC. CODE § 415.20.

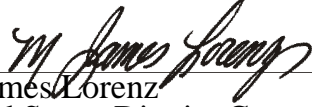
3 Plaintiff’s certificate of service on its face clearly and unequivocally shows that plaintiff’s  
4 attempted service of process on Counsell was defective because it was mailed to the City  
5 Attorney’s Office.

6 Plaintiff had ample opportunity to effectuate service of process in this case. The Court  
7 granted three extensions of the 120-day time limit provided in Federal Rule of Civil Procedure  
8 4(m). During that time, plaintiff did not serve defendant Counsell. Because the time for serving  
9 Counsell has long since expired, the Court will dismiss Counsell from this action.

10 Based on the foregoing, defendant Monty Counsell’s motion to dismiss for ineffective  
11 service of process and failure to timely serve the Second Amended Complaint is **GRANTED**.

12 **IT IS SO ORDERED.**

13 DATED: August 14, 2008

14   
15 M. James Lorenz  
United States District Court Judge

16 COPY TO:

17 HON. LEO S. PAPAS  
18 UNITED STATES MAGISTRATE JUDGE

19 ALL PARTIES/COUNSEL  
20  
21  
22  
23  
24  
25  
26  
27  
28